

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

California Department of Water Resources and the
City of Los Angeles

Project No. 2426-204

ORDER DENYING REHEARING

(Issued July 19, 2007)

1. On June 8, 2005, the Commission issued a public notice of California Department of Water Resources' (California DWR) and the City of Los Angeles' application to amend their license for the California Aqueduct Project No. 2426. On April 13, 2007, California Trout filed a late motion to intervene in the proceeding. In addition, on April 27, 2007, the National Marine Fisheries Service (NMFS) filed a late motion to intervene. In separate notices, the Commission Secretary denied California Trout's and NMFS' late interventions on May 18, 2007. California Trout and NMFS both seek rehearing of the notices. For the reasons discussed below, the Commission denies both requests for rehearing.

I. Background

2. The California Aqueduct Project, licensed to California DWR and the City of Los Angeles (licensees), is located on the California Aqueduct in San Bernadino, Los Angeles, San Luis Obispo, Ventura, and Kern Counties, California. The project was designed to be an integral component of the State Water Project, which provides water for agricultural and domestic purposes to Southern California through a system of canals, pipelines, pumping stations, and reservoirs.

3. On March 17, 2005, licensees filed an application to amend the project license. The application sought a revision of the minimum flow schedule for Piru Creek below Pyramid Dam and a modification of the trout fishery requirements of the project license. On April 12, 2005, the Commission approved a temporary waiver of the minimum

instream flow requirements of the license in advance of the license amendment.¹ On April 6, 2005, California Trout filed comments on the proposed license amendment and, on April 25, 2005, filed supplemental comments on the proposed amendment.

4. On June 8, 2005, the Commission issued public notice of licensees' application for amendment. The notice established a deadline of July 8, 2005, for the filing of protests, comments, and motions to intervene in the proceeding. On July 14, 2005, California Trout again filed comments regarding the proposed amendment's effects on Piru Creek.

5. On March 1, 2007, the Commission issued a draft Environmental Assessment (EA) for the proposed license amendment and requested public comments. California Trout filed timely comments on the EA.

6. As noted above, late motions to intervene in the amendment proceeding were filed by California Trout on April 13, 2007, and by NMFS on April 27, 2007. In separate notices issued on May 18, 2007, the Commission Secretary denied late intervention to both California Trout and NMFS, stating that each entity failed to show good cause for seeking late intervention.

7. California Trout, on June 11, 2007, and NMFS, on June 14, 2007, filed requests for rehearing of the notices denying their motions to intervene.

II. Discussion

8. The Commission's regulations dealing with motions for late intervention state that, in acting on such a motion, the decisional authority may consider: whether the movants had good cause for not filing timely; any disruption of the proceeding that might result from permitting intervention; whether the movant's interest is adequately represented by other parties; and, whether any prejudice to, or additional burden on, existing parties might result from permitting intervention.² Late intervention at the early stages of a proceeding generally does not disrupt the proceeding or prejudice the interest of any party. The Commission is therefore more liberal in granting late intervention at the early stages of a proceeding, but becomes progressively more restrictive as the

¹ *California Department of Water Resources and the City of Los Angeles*, 111 FERC ¶ 62,040 (2005).

² 18 C.F.R. § 385.214(d) (2006).

proceeding nears its end.³ Even though California Trout and NMFS are not seeking to intervene after issuance of a final order, they are seeking to intervene in a proceeding well past its initial stages, and therefore must provide a more substantial justification to show good cause for being allowed to intervene nearly two years after the commencement of this proceeding.

9. The Commission has, on many occasions, denied late intervention where movants failed to provide adequate justification to support their motions.⁴ The Commission expects parties to intervene in a timely manner based on the reasonably foreseeable issues arising from the applicant's filings and the Commission's notice of proceedings.⁵ In

³ *Transok, LLC (Transok)*, 89 FERC ¶ 61,055 at 61,168 (1999). For instance, after issuance of a final order in a proceeding, a petitioner for late intervention bears a higher burden to show good cause and generally it is Commission policy to deny late intervention at the rehearing stage, even when the movant claims that the decision established a broad policy of general application. *See, e.g., Williston Basin Interstate Pipeline Co. (Williston)*, 112 FERC ¶ 61,038 at P 12 (2005); *Williston*, 81 FERC ¶ 61,033 at 61,178 (1997) *citing Transcontinental Gas Pipeline Corp.*, 79 FERC ¶ 61,205 (1997); *Cameron LNG*, 112 FERC ¶ 61,146 at P 6 (2005).

⁴ *See Calpine Oneta Power, LP*, 119 FERC ¶ 61,177 at P 8 (2007) (movants did not meet their burden of justifying late intervention); *Duke Energy Shared Services, Inc. et al. (Duke Energy)*, 119 FERC ¶ 61,146 at P 8 (2007) (movant did not show good cause for not filing timely beyond noting that it was not aware of the proceeding); *Crown Landing, LLC (Crown Landing)*, 117 FERC ¶ 61,209 at P 12 (2006) (movant's assertion that it saw no need to intervene prior to the issuance of a dispositive order does not provide good cause); *Erie Boulevard Hydropower, LP (Erie Boulevard)*, 117 FERC ¶ 61,189 at P 31-33 (2006) (denial of late motion to intervene because movant failed to demonstrate cognizable interest in the proceeding or a justification for lateness); *Florida Gas Transmission Company*, 100 FERC ¶ 61,241 at P 31 (2002) (denial of late motion to intervene six months after intervention deadline because movants had or should have had knowledge of the subject matter of the proceeding); *Northern Utilities, Inc.*, 20 FERC ¶ 61,343 at 61,718 (1982) (movants gave no reason for lateness of notice).

⁵ *See Texas Eastern Transmission, LP*, 102 FERC ¶ 61,262 at P 11-12 (2003) (denying late intervention where proceeding had been underway for several years and granting motions would have been disruptive); *Southern California Edison Company*, 100 FERC ¶ 61,327 at P 7 (2002) (“[A]ny . . . party . . . must take appropriate steps to protect its interests. Choosing to focus on other matters rather than to timely respond to a filing before this Commission falls far short of good cause that would support a later intervention request.”); *Niagra Mohawk Power Corporation*, 100 FERC ¶ 61,247 (2002)

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Summit Hydropower,⁶ the Commission denied a motion to intervene a year out of time, explaining that “[a] key purpose of the intervention deadline is to determine, early on, who the interested parties are and what information and arguments they can bring to bear. Interested parties are not entitled to hold back awaiting the outcome of the proceeding, or to intervene when events take a turn not to their liking.”⁷ These holdings, which the Commission continues to apply to the facts here, have been affirmed by the courts.⁸

10. California Trout disputes that it failed to provide good cause for seeking late intervention, and states that it had good cause for filing out-of-time because the Commission did not issue the draft EA until 19 months after the deadline for interventions.⁹ California Trout states that critical regulatory decisions and scientific

(fact that intervenors thought that “either there appeared to be no disputes relevant to their interests, or . . . assumed that any disputes would be resolved without their intervention” not sufficient to justify late intervention).

⁶ 58 FERC ¶ 61,360 at 62,199-200 (1992).

⁷ See, e.g., *Duke Energy*, 119 FERC ¶ 61,146 (2007) (denying late intervention less than one month after deadline); *PJM Interconnection, LLC (PJM)*, 116 FERC ¶ 63,031 (2006) (denying late intervention five months after deadline); *Rancho Riata Hydro Partners (Rancho Riata)*, 55 FERC ¶ 61,389 (1991) (denying late intervention four years after the deadline); *Cogeneration, Inc.*, 54 FERC ¶ 61,178 (1991) (denying late interventions six years after the deadline); *Mohawk Dam 14 Associates*, 52 FERC ¶ 61,232 (1990) (denying motion to intervene 11 days after deadline); *Dale L.R. Lucas and Alternative Energy Resources, Inc.*, 41 FERC ¶ 61,187 (1987) (denying intervention two years after deadline); *Georgia-Pacific Corporation*, 33 FERC ¶ 61,417 (1985) (denying motion to intervene five months after deadline).

⁸ See, e.g., *Covelo Indian Community v. FERC*, 895 F.2d 581 (9th Cir. 1990) (affirming denial of late intervention where the tribe alleged it had not received actual notice of proceeding and Commission found that late intervention would be burdensome). Here, the movants do not argue that they did not have notice of California DWR’s amendment request.

⁹ California Trout asked the Commission to distinguish this situation from that of *Erie Boulevard*, 117 FERC ¶ 61,189. Although neither movants’ interests are specifically represented in this proceeding, both California Trout and NMFS were aware of the impacts of the proposed amendment and California Trout, as it admitted, has already participated in the proceedings. Consistent with *Erie Boulevard*, the Commission cannot allow parties to sit on their rights and enter into an ongoing proceeding when a

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reports were issued after the intervention deadline that changed the legal and biological situation at Piru Creek. In January 2006, NMFS issued a final rule regarding the listing of the endangered steelhead trout and designation of critical habitats. California Trout states that the final rule omitted the portion of Piru Creek upstream of the Santa Felicia Dam from critical habitat designation, thus limiting the legal protection for steelhead under the Endangered Species Act (ESA).¹⁰ California Trout avers that since NMFS' draft rule had included this area within the critical habitat designation, California Trout had found it unnecessary to intervene in this proceeding since the ESA would have protected the steelhead from the potential harmful effects of the proposed license amendment.¹¹ California Trout cites to two additional reports which also contributed to its filing for late intervention.¹² California Trout states that the reports contradict California DWR's Environmental Impact Report and believes that its intervention is warranted to further protect the steelhead population.

situation does not turn out in their favor. The Commission notes, that even as non-intervening parties, it will consider all comments from California Trout and NMFS with full weight. While both California Trout and NMFS state that no other party to this proceeding can represent their interests adequately, this alone is not enough to overcome this failure to provide any convincing reason why they did not intervene in a timely manner. Moreover, we see no reason why the timing of the EA is relevant. We often issue environmental documents in timeframes similar to that in this proceeding.

¹⁰ 70 *Fed. Reg.* 52,488, 52,581 (Sept. 2, 2005).

¹¹ 69 *Fed. Reg.* 71,880, 71,889 (Dec. 10, 2004). See April 6, 2006 letter to Celeste Cantu, Executive Director, State Water Resources Control Board, and Magalie R. Salas, Secretary, Federal Energy Regulatory Commission, from Jim Edmonson, Southern California Manager, California Trout.

¹² D. Girman & J.C. Garza, *Population structure and ancestry of O. mykiss populations in South-Central California based on genetic analysis of microsatellite data*, Final Report of the National Marine Fisheries Service, Southwest Fisheries Science Center, Santa Cruz, California, for the California Department of Fish and Game Project No. P0350021 and Pacific States Marine Fisheries, Contract No. AWIP-S (November 2006) (provides evidence that contemporary rainbow trout are genetically identical to steelhead, indicating that the steelhead historically accessed the habitat in the Santa Felicia Dam); Nancy H. Sandburg, *Middle Piru Creek Arroyo Toads (Bufo californicus) Clutch Surveys 2006*, prepared for California Department of Water Resources (February 2006) (suggests that the proposed amendment would reduce summer flows and thereby eliminate the rainbow trout in Piru Creek).

11. For its part, NMFS states that it has good cause to intervene out-of-time because it has obtained information not available at the time of the deadline for interventions. NMFS asserts that three reports were issued that provided significant new information on the potential effects of the proposed amendment on the steelhead.¹³

12. Both California Trout and NMFS state that no other party to the proceeding can adequately represent their interests. They also contend that allowing intervention at this point in the proceeding will not result in any disruption or prejudice.

13. Neither California Trout nor NMFS has provided any convincing reason why they could not have intervened earlier in the proceeding. Both entities have been well aware from the beginning that the amendment could impact steelhead trout. In March 2005, parties were placed on notice that the proposed amendment could potentially have an impact on the species in the proposed project area.¹⁴ In fact, California Trout filed comments, specifically referring to its concerns about steelhead, between the date the amendment application was filed and the deadline for interventions.¹⁵ NMFS had likewise discussed the potential impact of the proposed amendment on steelhead even

¹³ D. Girman & J.C. Garza, *Population structure and ancestry of O. mykiss populations in South-Central California based on genetic analysis of microsatellite data*, Final Report of the National Marine Fisheries Service, Southwest Fisheries Science Center, Santa Cruz, California, for the California Department of Fish and Game Project No. P0350021 and Pacific States Marine Fisheries, Contract No. AWIP-S (November 2006); D.A. Boughton *et al.*, *Steelhead of south-central/southern California coast: population characterization for recovery planning*, NOAA Technical Memorandum, NOAA-TM-NMF-SWFSC-394 (October 2006) (identifies the Santa Clara River steelhead population as a “core” population essential for the successful recovery of endangered steelhead); D.A. Boughton & M. Goslin, *Potential steelhead over-summering habitat in south-central/southern California coast recovery domain: maps based on the envelope method*, NOAA Technical Memorandum, NOAA-TM-NMFS-SWFSC-391 (July 2006) (describes the over-summering habitat for steelhead available upstream of the Santa Felicia Dam, including the action area).

¹⁴ See Licensees’ Application Part 1, p. 110.

¹⁵ See comments of April 6, 2005. California Trout also filed comments on July 14, 2005, six days after the deadline for comments, protests, and interventions, referring to its ESA concerns.

before the amendment was filed.¹⁶ However, neither entity intervened in a timely manner. The Commission has held that the party bears the responsibility for determining when a proceeding is relevant to its interests, such that it should file a motion to intervene. When a party fails to intervene in a timely fashion, the party assumes the risk that the case will be settled in a manner that is not to its liking.¹⁷

14. The Commission has previously explained that an entity cannot “sleep on its rights” and then seek untimely intervention.¹⁸ The Commission’s rules are designed to “ensure an orderly administrative process” and that “the certainty that there will be an

¹⁶ See 69 Fed. Reg. 71,880 (NMFS draft rule which identified the portion of Piru Creek upstream of the Santa Felicia Dam as a critical habitat designation for steelhead trout). See also January 11, 2005 letter from Rodney R. McGinnis, Regional Administrator, National Marine Fisheries Service, to Eva Begley, Department of Natural Resources (filed January 18, 2005).

¹⁷ *PJM*, 116 FERC ¶ 63,031 at P 3. See *Williston*, 112 FERC ¶ 61,038 at P 14; *Transok*, 89 FERC at 61,187; *El Paso Natural Gas Company*, 75 FERC ¶ 63,011 at 65,302 (1996); *Pacific Gas and Electric Company*, 51 FERC ¶ 61,371 at 62,264 (1990); *Southwestern Public Service Company*, 22 FERC ¶ 61,341 at 61,153 (1983).

¹⁸ See, e.g., *Erie Boulevard*, 117 FERC ¶ 61,189 at P 37; *San Diego Gas & Electric Co., Complainant v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent Sales Operator and the California Power Exchange, Respondents; Investigation of Practices of the California Independent System Operator and the California Power Exchange*, 112 FERC ¶ 61,226 at 3, n.4 (2005) (finding that allegation by movants that it could not rely on other party to protect its interests did not justify late intervention in proceeding that had been pending for a number of years); *PJM*, 112 FERC ¶ 61,031 at P 10 (2005) (denying late intervention where issue raised by movants had always been an issue in the proceeding); *Williams Energy Marketing & Trading Company California, et al. v. Cabrillo Power I LLC, et al.*, 105 FERC ¶ 61,165 at P 8 (2003) (unsupported intervention would result in disruption to proceeding and prejudice to parties); *Southern Company Services*, 87 FERC ¶ 61,097 at 61,416-17 (1999), citing *Texaco Puerto Rico, Inc. v. Dep’t of Consumer Affairs*, 60 F.3d 867, 879 (1st Cir. 1995) (equity ministers to the vigilant, not to those who sleep upon their rights); *Russell Canyon Corporation*, 58 FERC ¶ 61,288 at 61,922 (1992) (mistaken belief that intervention unnecessary to protect rights not good cause for late intervention); *BP Gas Transmission Company*, 45 FERC ¶ 61,475 (1988) (those who sit on their rights “passively anticipating a regulatory outcome favorable to their interests” will be denied permission to intervene out of time).

end to interventions which prolong the proceeding is an important consideration of parties filing before the Commission.”¹⁹ The fact that studies issued during the course of this proceeding, and in the case of California Trout, NMFS’ actions, provided additional information about steelhead does not excuse tardy intervention.²⁰ Both entities were inarguably aware when the application was filed that steelhead trout could be impacted, yet did not intervene timely.²¹ It is the very nature of our licensing actions (such as amendments) that studies are conducted and new information is developed as they proceed. It is the responsibility of interested entities to intervene if, as occurred early on here, they became aware that resources of concern to them may be affected by the proposed action. Were we to allow new intervention every time a new study was conducted or new information was otherwise placed in the record, we would never be able to establish a deadline for interventions, which is necessary for us to conduct orderly proceedings. Allowing intervention, 19 months after the deadline, would delay, prejudice, and place additional burdens on the Commission and the licensees.

15. Movants have not provided sufficient justification for the Commission to grant their extremely late motions to intervene, and therefore we deny rehearing.

¹⁹ *Palisades Irrigation District*, 34 FERC ¶ 61,377 at 61,702 (1986). See *Erie Boulevard*, 117 FERC ¶ 61,189 at P 37.

²⁰ “To permit . . . a person . . . to stand aside and speculate on the outcome . . . and then permit the whole matter to be reopened . . . would create an impossible situation.” *Easton Utilities Commission v. Atomic Energy Commission*, 424 F.2d 847, 851 (D.C. Cir. 1970) quoting *Red River Broadcasting Co. v. Federal Communication Commission*, 98 F.2d 282, 286-87 (D.C. Cir. 1938), cert. denied, 305 U.S. 625 (1938). See *Crown Landing*, 117 FERC ¶ 61,209 at P 12 (the wait-and-see approach does not provide good cause under Rule 214); *Florida Power & Light Company*, 99 FERC ¶ 61,318 at P 9 (2002) (the wait-and-see attitude falls far short of demonstrating good cause that would support a late motion to intervene); *Central Illinois Public Service Company*, 59 FERC ¶ 61,219 at 61,754 (1992) (lack of foresight does not constitute good cause for late intervention); *Rancho Riata*, 55 FERC at 62,187 (movant not entitled to intervene when the outcome of the proceeding is not to his liking).

²¹ California Trout stated that by filing comments regarding licensees’ amendment application, the Commission should have been alerted to California Trout’s interest in the proceeding. The Commission is not required to make assumptions for parties who sit on their rights. Only California Trout is responsible for ensuring that its interests are adequately represented in a timely fashion.

The Commission orders:

The requests for rehearing filed by California Trout, on June 11, 2007, and by the National Marine Fisheries Service, on June 14, 2007, are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.